

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. F12
CAUSE NO. 49F12-0512-MJ-050376

AIMCO MICHIGAN MEADOWS
HOLDINGS, LLC,

Petitioner,

v.

INDIANA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,

Respondent.

FILED

(189) SEP 12 2006

Dawn A. Scheller
CLERK OF THE
MARION SUPERIOR COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on Petitioner AIMCO Michigan Meadows Holdings, LLC's ("AIMCO") Verified Petition for Judicial Review ("Verified Petition") of a final agency order of the Office of Environmental Adjudication ("OEA") entitled Findings of Fact, Conclusions of Law, and Order dated December 2, 2005 (the "Final Order"), which granted Genuine's Motion for Summary Judgment. As directed by the Court, the parties fully briefed the issues raised in the Verified Petition and appeared before the Court for oral arguments regarding those issues on August 17, 2006. The Court, having considered the briefs, arguments of counsel, and the administrative record, now makes these findings of fact and conclusions of law and enters judgment as follows:

SEP 12 2006

FINDINGS OF FACT

1. The parties do not dispute any of the findings of fact in the Final Order. Accordingly, the Court generally incorporates those findings of fact by reference and specifically outlines those findings of fact that are material to the Court's judgment.

2. Respondent Genuine Parts Company ("Genuine") is the successor-in-interest to a business that operated at the former Allison Plant 10 property located at 700 N. Olin Avenue, Indianapolis, Indiana (the "Site"). Although it never owned or operated the Site, Genuine has accepted responsibility for the remediation of contamination at the Site.

3. AIMCO owns the Michigan Meadows Apartments (the "Apartments") and the Michigan Meadows Plaza (the "Plaza"), which are adjacent to and immediately south of the Site.

4. Genuine enrolled the Site into the Indiana Voluntary Remediation Program ("VRP") to address contamination in the soils at and groundwater beneath the Site.

5. On November 9, 1999, the Indiana Department of Environmental Management ("IDEM") accepted Genuine's VRP application. On January 11, 2000, Genuine and IDEM entered into a voluntary remediation agreement.

6. On October 30, 2002, Genuine submitted a remediation work plan to IDEM for its review. It was submitted in a timely manner. Genuine submitted a revised remedial work plan to IDEM for its approval on August 16, 2004.

7. AIMCO, among others, provided comments on the remedial work plan during the public comment period authorized by statute.

8. Following the close of the public comment period, IDEM approved the remedial work plan with modifications on March 22, 2005 ("Modified RWP Approval").

9. AIMCO filed its Petition for Administrative Review and Adjudicatory Hearing on April 7, 2005.

10. Genuine filed its Motion for Summary Judgment on October 7, 2005. The parties fully briefed the issues raised in the Motion. On December 2, 2005, the OEA entered the Final Order, which granted Genuine's Motion. The Final Order concluded that AIMCO's administrative action was against Genuine, and, therefore, AIMCO's action was barred by Ind. Code § 13-25-5-18(e) which prohibits administrative actions against VRP applicants while they are implementing a remedial plan under a Voluntary Remediation Agreement with IDEM.

11. AIMCO timely sought judicial review of the Final Order in this Court.

CONCLUSIONS OF LAW

1. This matter involves judicial review of an agency determination, the Final Order, under the Administrative Orders and Procedures Act ("AOPA"), Ind. Code § 4-21.5-5-1, *et seq.*

2. AOPA outlines the standard of review for the Court. A court may reverse an agency action subject to AOPA only if the court "determines that a person seeking judicial review has been prejudiced by an agency action that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence." Ind. Code § 4-21.5-5-14(d); *see Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 809-12 (Ind. 2004).

3. The burden of demonstrating the invalidity of an agency action is on the party asserting the invalidity. Ind. Code § 4-21.5-5-14(a).

4. The single question for the Court's consideration is whether Ind. Code

§ 13-25-5-18(e) prohibits AIMCO from bringing an administrative action under AOPA challenging the Modified RWP Approval.

5. The basis of both Genuine's Motion for Summary Judgment before the OEA, and the Final Order, is that AIMCO is precluded from bringing an administrative action under the AOPA against Genuine, based upon the following statutory provision:

"After an applicant and the department have signed a voluntary remediation agreement, a person may not bring an action, including an administrative action, against the applicant or any other person proceeding under this chapter on behalf of the applicant for any cause of action arising under this title or rules adopted under this title and relating to the release or threatened release of a hazardous substance or petroleum that is the subject of the agreement."

Ind.Code § 13-25-5-18(e) (emphasis added). It is not disputed that Genuine and IDEM have signed a voluntary remediation agreement.

6. The Final Order concludes as a matter of law that "... I.C. 13-25-5-18 prohibits the Petitioner from bringing this action against the Respondent." This conclusion is contrary to law.

7. IDEM's issuance of the Modified RWP Approval is an agency action subject to administrative review pursuant to Ind. Code §§ 4-21.5-3-5 and 7. AIMCO petitioned for administrative review of an IDEM agency action, the issuance of the Modified RWP Approval. It did not bring an administrative action against Genuine.

8. There is no requirement in the AOPA which would require Genuine to become a party to the petition for administrative review filed by AIMCO. The fact that Genuine voluntarily appeared and became a party to the administrative proceeding does not transform AIMCO's petition for administrative review of the IDEM Modified RWP Approval into an administrative action against Genuine.

9. Genuine's reliance upon an interlocutory Order in a matter before the Southern District of the United States District Court entitled AIMCO Michigan Meadows Holdings, LLC

v. Genuine Parts Company, Cause No: 1:05-cv-088-LJM-WTL in support of its position that AIMCO may not bring an administrative action against Genuine is misplaced.¹ In the federal court action, AIMCO did indeed bring an action against Genuine. There, the Court found that none of the exceptions contained in Ind. Code §13-25-5-18(e) permitted AIMCO to bring two counts of its Complaint against Genuine relating to Title 13 of the Indiana Code. This ruling is irrelevant to this cause because AIMCO did not bring its administrative action against Genuine, but rather against IDEM.

10. Nothing in Ind. Code §13-25-5-18(e) bars an administrative action under Ind. Code § 4-21.5 against IDEM. Under OEA's interpretation, neighboring landowners affected by an IDEM voluntary remediation work plan approval would have no remedy to challenge that agency action, which would undermine the right to seek administrative review of agency actions by aggrieved or adversely affected persons established under Ind. Code § 4-21.5-1-1, *et seq.*

11. AIMCO's right to seek administrative review of the Modified RWP Approval is not precluded by Ind. Code § 13-25-5-18(e).

12. The Final Order is not in accordance with law, and is not supported by substantial evidence.

13. AIMCO has been prejudiced by the Final Order because it denies AIMCO its right to petition for administrative review of an agency action which, as a neighboring landowner, affects it.

¹ It appears that Genuine referenced and attached this Order as legal authority, and not in an attempt to supplement the agency record. Therefore, AIMCO's Motion to Strike this Order is denied. Counsel for AIMCO previously withdrew his Motion to Strike with respect to Attachment 2 to Genuine's Brief in Opposition at oral argument.

14. Because this Court has determined that AIMCO has been prejudiced by the Final Order which is not in accordance with law and unsupported by substantial evidence, it may, pursuant to Ind. Code § 4-21.5-5-15, remand this case to the OEA for further proceedings.

ORDER

It Is therefore ORDERED that AIMCO's Verified Petition for Judicial Review is GRANTED. This matter is hereby REMANDED to the Office of Environmental Adjudication for administrative review proceedings in accordance with Ind. Code § 4-21.5-1-1, *et seq.*

So ORDERED this 11TH day of September, 2006.

Michael D. Keele
Judge, Marion Superior Court
Civil Division, Room No. F12

Distribution:

*copy
posted
my*
/ Madonna F. McGrath
BAKER & DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204-1782

/ Daniel P. McInerney
BOSE McKINNEY & EVANS LLP
2700 First Indiana Plaza
135 N. Pennsylvania Street
Indianapolis, IN 46204

/ Justin Barrett
Deputy Attorney General
Office of Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204